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In The

Supreme Court of the United States

October Term, 1991

National Railroad Passenger Corporation and
Central Vermont Railway, Inc.,
Petitioners,

v.

Boston and Maine Corporation, *et al.*,
Respondents.

Interstate Commerce Commission and
The United States,
Petitioners,

v.

Boston and Maine Corporation, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF RESPONDENTS STATE OF VERMONT AND COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the majority of a divided panel for the United States Court of Appeals for the District of Columbia Circuit erred in holding that the National Railroad Passenger Corporation's ("Amtrak's") authority, under § 402(d) of the Rail Passenger Service Act ("RPSA"), 45 U.S.C. § 562(d), to condemn railroad property "required for intercity rail passenger service" unambiguously limits Amtrak to condemning only that property that Amtrak retains for its own use, and thus unambiguously precludes Amtrak from obtaining the use of suitably-maintained tracks by condemning and transferring railroad property from a neglectful owner to a demonstrably more responsible carrier.

2. Whether the majority below erred in refusing to apply, on petition for rehearing, amendments to the RPSA that Congress passed for the express purpose of overturning the majority's initial decision in this case.

3. Whether the Interstate Commerce Commission's allowance of Amtrak's condemnation and subsequent reconveyance should have been upheld by the court of appeals in this case.

PARTIES TO THE PROCEEDING

Other parties to the proceeding in the court below, in addition to those listed in the caption, are the State of Vermont, the Commonwealth of Massachusetts, Windsor Minerals, Inc., Canadian Pacific, Ltd., and the Railway Labor Executives Association.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1419

NATIONAL RAILROAD PASSENGER CORPORATION and CENTRAL VERMONT RAILWAY, INC.,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *et al.*,
Respondents.

No. 90-1769

INTERSTATE COMMERCE COMMISSION and THE UNITED STATES,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENTS STATE OF VERMONT AND COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF PETITIONERS

Respondents State of Vermont and Commonwealth of Massachusetts seek reversal of the decisions and judgment of the United States Court of Appeals for the District of Columbia in these consolidated cases.

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App.* 5a-27a) is reported at 911 F.2d 743 (D.C. Cir. 1990).

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* "Pet. App." refers to the appendix to the petition filed in No. 90-1419.

The opinion of the court of appeals denying rehearing (Pet. App. 1a-4a) is reported at 925 F.2d 427 (D.C. Cir. 1991). The final decision of the Interstate Commerce Commission ("ICC") (Pet. App. 29a-109a) is reported at 4 I.C.C.2d 761 (1988). Interim decisions of the ICC served July 5, 1988, May 25, 1988, and April 29, 1988 (Pet. App. 110a-112a, 113a-118a, 119a-135a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1990. Pet. App. 5a. The order of the court denying rehearing was entered on February 1, 1991. Pet. App. 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

These consolidated cases concern the proper interpretation of § 402(d) of the Rail Passenger Service Act ("RPSA"), 45 U.S.C. § 562(d). This provision and other related sections of the RPSA are reproduced in Pet. App. 136a-144a. Also at issue is the meaning of § 9 of the Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9, 104 Stat. 4654, 4658 (1990), which is reproduced in Pet. App. 145a.

STATEMENT

From 1972 until April 1987, the National Railroad Passenger Corporation ("Amtrak") operated the *Montrealer*, a passenger train that ran from Washington, D.C. to Montreal, Canada via western Massachusetts, Vermont and New Hampshire. During its 15-year run, the *Montrealer* served as the sole passenger line linking Vermont to Canada, and to the northeastern United States seaboard between Boston and Washington, D.C. As such, it carried thousands of residents and tourists in and out of Vermont and other New England states. Pet. App. 128a.

In April 1987, Amtrak was forced to discontinue *Montrealer* service due to the severe physical deterioration of a 48.8 mile stretch of the Connecticut River Line ("Conn River Line") owned by respondent Boston and Maine Corporation ("B&M"). Both before and after discontinuing the *Montrealer*, Amtrak engaged in extensive discussions with B&M concerning maintenance deficiencies on the Conn River Line and, later, Amtrak's possible purchase of the tracks from B&M. When these efforts proved unsuccessful, Amtrak invoked its authority under § 402(d) of the RPSA, 45 U.S.C. § 562(d), for an order of the ICC condemning B&M's track and reconveying that property to the Central Vermont Railway, Inc. ("CV"), a carrier that operated over the line and had committed itself to upgrading and maintaining the tracks to passenger service standards.

The ICC approved Amtrak's application, subject to a grant back to B&M of trackage rights over the line, concluding that § 402(d) permitted Amtrak to condemn and subsequently reconvey B&M's property to another carrier. The court of appeals, however, invalidated the ICC's decision. Viewing the proposed transaction as "a scheme whose purpose was to effect a transfer of B&M's property not to Amtrak, but to Central Vermont" (Pet. App. 17a), the panel majority concluded that Amtrak cannot condemn a fee simple interest it does not intend to retain because, according to the majority, subsequent reconveyance demonstrates that the property is not "required for intercity rail passenger service" under § 402(d). *Id.* at 15a-18a.

While petitions for rehearing were pending, Congress passed the Independent Safety Board Act Amendments of 1990 ("ISBA"), Pub. L. No. 101-641, § 9, 104 Stat. 4654, 4658 (1990), which amended § 402(d) to make clear that Amtrak may condemn property and reconvey it to a third party provided the ICC concludes (as it did here) that the reconveyance furthers the purposes of the RPSA.

Congress expressly made the ISBA applicable to pending cases. The panel majority, however, denied rehearing, deeming the amendment inapplicable to its prior decision. Pet. App. 3a.

The State of Vermont and the Commonwealth of Massachusetts believe that the remarkable decisions below—in which the panel majority not only refused to defer to an authoritative agency interpretation of the RPSA, but also refused to give effect to legislation expressly designed to overrule the panel's initial decision—may well be explained, if not excused, by the majority's misapprehension of the facts of this case. While the States believe the ISBA, as well as principles of agency deference, dictate reversal of the decision below, a description of the underlying facts helps illustrate the propriety of the ICC's initial decision and the errors the court of appeals committed in overturning that decision.

1. Factual Background

Amtrak commenced its *Montrealer* service in September 1972 in response to public demand and congressional direction. Amtrak's two daily trains (one north, one south) between Montreal and Washington, D.C. attracted a significant ridership, consisting largely of passengers seeking access to the Vermont and New Hampshire resort areas; visitors to the cities and towns along the *Montrealer*'s route (which included the major cities of New Haven and Hartford, Connecticut, and Springfield, Massachusetts); local residents traveling to other points on the Amtrak system; and passengers desiring international service to and from Montreal. J.A. 34-35. The *Montrealer* provided the only rail passenger service in either Vermont or New Hampshire. *Id.* at 35.

Like most Amtrak trains, the *Montrealer* operated over track owned not by Amtrak itself, but by freight carriers. The train traversed Massachusetts from Springfield to East Northfield over a B&M portion of the Conn River

Line; it traveled from East Northfield to Brattleboro, Vermont, over CV tracks; from Brattleboro to Windsor, Vermont, it operated again over a B&M-owned portion of the Conn River Line; and from Windsor to the Canadian border, it ran on CV tracks. In 1977, Amtrak negotiated an operating agreement under which B&M agreed to maintain its portions of the Conn River Line to standards that would permit pasenger trains to operate at certain prescribed speeds. *Id.* at 37. In exchange, Amtrak agreed to make significantly higher maintenance payments reflecting this enhanced standard of service. *Id.*

Initially, Amtrak's contractual relationship with B&M was a satisfactory one. Indeed, for several years, the *Montrealer*'s on-time performance over B&M tracks exceeded the Amtrak system average. *Id.* at 38. Amtrak's experience under the agreement, however, changed dramatically after Guilford Transportation Industries, Inc. ("Guilford") acquired the B&M in June 1983, and the Delaware & Hudson Railway ("D&H") in January 1984. Because the D&H provided an alternate route for Canada-bound freight through New York state, the Conn River Line was far less important in the Guilford system than it had been in B&M's. In fact, because B&M's competitor, CV, also used the Conn River Line for its traffic to Canada, Guilford had a strong incentive to favor its D&H route and allow its portion of the Conn River Line to deteriorate.[1]

Such deterioration became all too apparent during the summer of 1985, when maintenance deficiencies led to a rash of freight derailments and a series of speed restrictions that reduced the *Montrealer*'s on-time perform-

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[1] Indeed, because the State of Vermont feared that Guilford's competitive interests would lead it to downgrade the B&M line, the State opposed Guilford's acquisition of the D&H. *Guilford Transp. Indus., Inc.—Control—Delaware & H. Ry.*, 366 I.C.C. 396, 408 (1982), *aff'd in part and remanded in part sub nom. Central Vermont Ry.* v. *ICC*, 711 F.2d 331 (D.C. Cir. 1983).

ance to approximately 50 percent. *Id.* at 38-39, 84. During subsequent inspections of the line by Amtrak and Vermont officials, B&M explained that it had no plans to perform the work necessary to restore the track to its earlier service standards and in fact was reducing traffic over, and maintenance on, the line. *Id.* at 39. At a December 1985 meeting, senior Guilford officials confirmed that the reduced speeds were compatible with B&M's freight operations, and hence that no significant maintenance program was planned for the Conn River Line. *Id.* at 40.

During the first three months of 1986, the *Montrealer*'s on-time performance continued to average approximately 50 percent. This unacceptable performance was exacerbated by a strike by B&M employees in the spring of that year, which forced a complete suspension of passenger service north of Springfield. *Id.* Between May 24, 1986, when Amtrak resumed service to Montreal, and April 1987, when maintenance deficiencies compelled Amtrak to discontinue the *Montrealer*, not a single passenger train met its contractually agreed upon schedule. *Id.*

Amtrak inspections during the latter half of 1986 and the beginning of 1987 revealed that B&M was allowing the Conn River Line to deteriorate further. Speed restrictions became endemic on the line,[2] such that, by April 1987, the *Montrealer*'s average speeds over B&M's southern and northern segments were reduced to the commercially unacceptable levels of 25.85 and 17.27 miles per hour respectively (*id.* at 41), and the train's running time over B&M tracks was more than two hours longer than it had been in 1981. *Id.* at 43. Amtrak officials, moreover, were repeatedly advised that B&M had no plans to up-

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[2] While, as of January 1985, none of the line was subject to speed restrictions, by September 1986, 93.8 out of a total of 107 miles were subject to such restrictions; 81.4 of those miles, or better than three-fourths of the track, were restricted to speeds below those specified in the 1977 operating agreement. J.A. 41.

grade the line and would only perform the minimum work necessary to meet Federal Railroad Administration ("FRA") requirements for the lowest class of track. *Id.* at 69-71.

In January 1987, Amtrak informed Guilford that it was imperative that Guilford live up to its obligations under the 1977 operating agreement and increase maintenance on the Conn River Line in order to eliminate the numerous speed restrictions. *Id.* at 43-44. Two months later, in a two sentence reply, Guilford advised Amtrak that it did not intend to perform significant maintenance and that "[n]o appreciable increase in track speed is anticipated." Court of Appeals Deferred Appendix 940. On April 9, 1987, an Amtrak inspection team concluded that "the safe operation of trains over portions of the [Conn River] [L]ine is barely within FRA standards, and could slip out of these tolerances at any given time at any given location." J.A. 70. Following a subsequent inspection in late April, Amtrak concluded that it had no choice but to suspend *Montrealer* service indefinitely.

Thereafter, Amtrak invoked arbitration to compel B&M to live up to its obligations under the 1977 operating agreement. B&M responded by terminating the contract and contesting the jurisdiction of the arbitrators. Following more than a year of litigation, the District of Columbia Circuit ultimately ordered B&M to submit to arbitration.[3] Subsequently, the arbitration panel found that B&M had breached its duty to maintain the Conn River Line to standards permitting operations at the minimum speeds required by Amtrak; indeed, the panel found that B&M had deliberately allowed the line to deteriorate and had made no effort to maintain it.[4]

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[3] *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 850 F.2d 756 (D.C. Cir. 1988).

[4] *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, NAP Cases Nos. 72, 74 (1988) (Nat'l Arb. Panel).

During the course of these protracted proceedings, Congress appropriated $5 million for the express purpose of enabling Amtrak to upgrade the Conn River Line and re-institute *Montrealer* service.[5] As a result, Amtrak met with Guilford officials on July 20, 1987 in an effort to discuss possible resumption of passenger service over the B&M portions of the line. J.A. 47. At this meeting, however, Guilford refused to give assurances that it would provide long-term maintenance of the line; indeed, Guilford officials indicated that they had made no effort to estimate the costs of rehabilitation, and stated that they were considering abandoning the segment altogether. *Id.* For its part, Amtrak made clear that it could not afford to purchase the line in order to operate two trains daily, and that, in order for passenger services to be feasible, the line required significant freight operations—either those of B&M or some other carrier. *Id.* at 132.

The parties agreed to meet a second time approximately one week later, but Guilford subsequently cancelled this meeting. One month later, Guilford advised Amtrak by letter that, while it would be happy to meet, it saw "no purpose in holding another meeting on the subject of the Montrealer." J.A. 65. The following day, B&M amended its System Diagram Map with the ICC in order to slate the Conn River Line for abandonment. *Id.* at 86-87.

At this point, Amtrak turned to CV to explore the possibility of restoring *Montrealer* service. CV had consistently maintained its portion of the Conn River Line to the standards set forth in its operating agreement with Amtrak, and the *Montrealer*'s on-time performance over CV's tracks regularly exceeded 95 percent. *Id.* at 48. Moreover, because CV's freight operations depend on the Conn River Line, Amtrak reasonably assumed that CV would continue to maintain the line after it was upgraded with federal funds. *Id.*

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[5] Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, 101 Stat. 391, 447-48 (1987).

While these discusions took place, Vermont officials met with Guilford in early November 1987, to discuss the proposed abandonment. Like Amtrak, state officials learned that Guilford had deferred even routine maintenance on the line; that B&M had no remedial plans to restore the line; and that, if and when B&M reinstituted routine maintenance, it had no need to maintain the track beyond 25 mile per hour capabilities. *Id.* at 87. The State subsequently concluded that the line's deterioration threatened Vermont's entire rail transportation system and was potentially detrimental to the public health and safety. J.A. 89.[6]

Convinced, like Amtrak, that Guilford's financial condition and competitive concerns made it extremely unlikely that Guilford would ever undertake the necessary rehabilitation and maintenance, Vermont began working with CV and Amtrak to restore *Montrealer* service. Following a series of arms-length negotiations, Amtrak and CV entered into an agreement under which 1) Amtrak would acquire B&M's northern segment of the Conn River Line (either through a negotiated sale or its eminent domain powers); 2) CV would reimburse Amtrak for the expense of acquiring B&M's property; 3) Amtrak would commit $3.1 million of its special federal appropriation to rehabilitate the tracks,[7] and CV would assume additional rehabilitation costs, if any; and 4) CV would agree to maintain the tracks to passenger service standards for 20 years. The agreement further provided for a grant of trackage rights to B&M in order to protect the latter's operations over the line. The State of Vermont

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[6] Indeed, during the first half of 1988, several freight derailments occurred on B&M's segment of the Conn River Line. Court of Appeals Deferred Appendix 995.

[7] Amtrak intended to reserve the balance of the $5 million federal appropriation for the eventual rehabilitation of B&M's southern segment of the line between Springfield and East Northfield, Massachusetts.

agreed to provide CV with over $870,000 to help pay for the acquisition of the line and an additional $265,000 for rehabilitation efforts.[8]

On March 18, 1988, Amtrak offered to purchase B&M's northern segment of the Conn River Line for $1 million. Following Guilford's rejection of that offer,[9] Amtrak applied to the ICC for an order pursuant to § 402(d) condemning B&M's property and conveying it to Amtrak for subsequent reconveyance to CV.

2. Proceedings Below

Section 402(d) of the RPSA permits Amtrak to acquire through condemnation "property (including interests in property) owned by [another] railroad and required for intercity rail passenger service" by applying to the ICC for an order establishing Amtrak's "need . . . for the property at issue and requiring the conveyance thereof" to Amtrak on just and reasonable terms, including payment of just compensation. 45 U.S.C. § 562(d). Amtrak's need for such property is *presumed* to be established unless the Commission finds that conveyance of the property would significantly impair the condemnee's ability to fulfill its common carrier obligations *and* that Amtrak's obligation to provide efficient and economical rail passenger service "can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms

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[8] See 1988 Vt. Acts (1987 Adj. Sess.) No. 211, Sec. 5 (eff. May 26, 1988). The State's provision of such funding is consistent with the assistance it had provided in the late 1970s to help B&M improve track and related equipment along the Conn River Line, and with the State's grade crossing improvements program, which had historically assigned special priority to Amtrak routes. J.A. 85-86.

[9] Guilford rejected Amtrak's offer by letter dated March 29, 1988. Between the time Guilford received Amtrak's offer and the time it rejected it, B&M amended its System Diagram Map to remove its portion of the Conn River Line from its list of facilities and tracks subject to potential abandonment.

to [Amtrak]," or is available by virtue of Amtrak's § 305(d) authority to condemn non-railroad property. *Id.*, § 562(d)(1)(A)&(B).

In approving Amtrak's exercise of its § 402(d) authority here, the ICC noted that under the RPSA "Amtrak is empowered to seek different types of relief depending on the type of service problems it encounters with other railroads." Pet. App. 39a. In instituting this "extraordinary proceeding," Amtrak had demonstrated that it had "exhausted all alternatives to condemnation and ha[d] found it necessary to resort to the condemnation powers under § 402(d)." *Id.* Indeed, Amtrak had made clear that "only when the subject line belongs to a party other than B&M will the line be available for prompt upgrading, permitting restoration of reliable and economical passenger service." *Id.* at 116a. Finding that "[t]he need for rehabilitation of the line has been clearly established" (*id.* at 85a), that prompt rehabilitation would be in the public interest (*id.*), that Amtrak and CV had engaged in arms-length negotiations "to achieve their respective corporate and public interests, and not to further some impermissible objective" (*id.* at 41a), and that B&M's competitive posture would not be adversely affected by the proposed transactions (*id.* at 83a-84a), the Commission approved Amtrak's condemnation.

In overturning this decision, a divided panel of the District of Columbia Circuit ruled that § 402(d) "unambiguously" precludes Amtrak from condemning an interest in railroad property that Amtrak does not intend to retain. Reasoning that the "statute contemplates that the property acquired by condemnation must be required by Amtrak for *its* use, as it alone is engaged in intercity rail passenger service," [10] the majority concluded that,

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[10] See Pet. App. 17a (emphasis in original).

because Amtrak did not intend to retain the fee simple interest it had condemned, that interest could not be "required for intercity rail passenger service." *Id.* at 18a. What Amtrak really needed, the majority observed, was use of B&M's segment of the line in a condition suitable for passenger rail service. *Id.* Ignoring B&M's history of intransigence, Amtrak's lengthy efforts to restore passenger service through negotiation and arbitration, and Amtrak's financial constraints, the majority suggested that Amtrak could have obtained use of the line through either of two less drastic means: 1) condemning an easement in B&M's property that would allow Amtrak to maintain the line, or 2) compelling B&M to grant Amtrak trackage rights pursuant to § 402(a) of the RPSA. Amtrak, the majority held, must employ these lesser remedies before resorting to condemnation of a fee simple interest (*id.*), and cannot use its powers of eminent domain simply to "substitut[e] one private owner for another." *Id.* at 20a.

While the case was still pending on rehearing, Congress amended the RPSA specifically to permit the transaction contemplated by the Amtrak-CV agreement. The ISBA authorizes Amtrak to "subsequently convey title or other interest in [Amtrak-condemned] property to a third party, if such reconveyance is found by the [ICC] to further the purposes of [the RPSA]." Pub. L. No. 101-641, § 9(a), 104 Stat. 4654, 4658 (1990). Congress, moreover, expressly made this provision applicable to the still-pending proceeding before the court of appeals. On rehearing, however, the panel majority concluded that the amendment did "not affect the requirement that the property that is subsequently conveyed may not be condemned in the first place if it is not 'required for intercity rail passenger service.'" Pet. App. 3a. Having previously found that the transaction failed to satisfy this requirement, the majority denied the petition for rehearing. *Id.*

SUMMARY OF ARGUMENT

I. The ICC properly construed § 402(d) of the RPSA to permit Amtrak to condemn and subsequently reconvey the railroad property at issue in this case. As even the majority below recognized, Amtrak's *Montrealer* service required use of suitably-maintained tracks. Neither the plain language nor the structure and history of the statute, however, speak to the precise question whether Amtrak may obtain the use of such tracks by condemning and transferring railroad property from a willfully neglectful owner to another, more responsible carrier. Accordingly, the question was left to the considered judgment of the ICC, the agency charged with administering the statutory provision at issue.

The ICC's determination that Amtrak could redress the chronic maintenance and service deficiencies it faced by transferring ownership of the Conn River Line to a demonstrably more responsible carrier was plainly permissible, and hence is entitled to deference from the courts. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The RPSA confers on Amtrak a number of remedial options, establishes separate criteria governing the availability of each, creates a presumption that Amtrak needs property that it seeks to condemn, and directs Amtrak to take appropriate measures to minimize its dependence on federal subsidies. The structure of the statute, therefore, indicates that Congress intended to give Amtrak broad latitude to decide how best to employ its remedial authority. Contrary to the majority's suggestion below, the "interplay" of Amtrak's optional remedies does not give rise to any exhaustion requirements or otherwise limit Amtrak's discretion, and certainly does not "unambiguously" prohibit the ICC's determination that Amtrak may choose which of its powers is best addressed to a particular service problem.

In the circumstances of this case, the ICC's determination that Amtrak's condemnation power was best suited to the problems arising out of B&M's neglect of the Conn River Line, and that Amtrak's passenger services over that line "required" condemnation and reconveyance of B&M's fee interest to another carrier, were plainly permissible. In view of the extraordinary difficulties B&M's neglect had caused, the ICC properly rejected B&M's claim that Amtrak's needs could be satisfied by acquisition of lesser interests in the line, and the agency's judgment is entitled to deference.

Any doubts concerning the propriety of the ICC's decision, moreover, were definitively laid to rest by passage of the Independent Safety Board Act Amendments of 1990, in which Congress expressly provided that Amtrak may reconvey railroad property it condemns, provided the ICC finds that such reconveyance furthers the purpose of the RPSA. The majority simply side-stepped this amendment, which was unambiguously intended to overrule the majority's initial decision.

II. The majority's additional reasons for invalidating the ICC's decision were meritless. The ICC properly considered and rejected B&M's claim that condemnation of its property would significantly impair its common carrier obligations. The majority below erred as a matter of law, moreover, in holding that the ICC may not consider the ameliorating effects of any conditions it places on a condemnation when considering claims of significant impairment. Finally, the ICC's finding that Amtrak's passenger service required transfer of the Conn River Line from B&M to CV—and that Amtrak's acquisition of lesser interests was an inadequate alternative—were the product of reasoned decisionmaking and are supported by substantial evidence.

ARGUMENT

I. THE INTERSTATE COMMERCE COMMISSION'S DETERMINATION THAT SECTION 402(d) OF THE RAIL PASSENGER SERVICE ACT PERMITTED AMTRAK TO CONDEMN AND SUBSEQUENTLY RECONVEY THE PROPERTY AT ISSUE IN THIS PROCEEDING WAS PERMISSIBLE.

At issue in this proceeding is the propriety of the ICC's interpretation of § 402(d) of the RPSA, a provision the agency is charged with administering.[11] Accordingly, the proper inquiry is whether "Congress has directly spoken to the precise question at issue"—*i.e.*, whether Amtrak may condemn railroad property that it intends to reconvey to another carrier—and, if not, "whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). It is abundantly clear here that Congress did not, in § 402(d), "unambiguously" preclude Amtrak from condemning railroad property that Amtrak intends to convey to another carrier, and that, under the facts of this case, the ICC's interpretation of Amtrak's condemnation authority was entirely permissible.

A. Section 402(d) Does Not Speak Directly To The Question Whether Amtrak May Condemn Property That Amtrak Intends To Reconvey To Another Carrier.

Section 402(d) provides, in relevant part:

> If [Amtrak] and a railroad are unable to agree upon terms for the sale to [Amtrak] of property (including interests in property) owned by the railroad and required for intercity rail passenger service, [Amtrak] may apply to the Commission for an order

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[11] Not only does the ICC administer those provisions of the RPSA governing Amtrak's authority to compel use or ownership of railroad property and facilities (see 45 U.S.C. § 562(a)-(d)), but Amtrak's operations are, with certain exceptions noted below, generally subject to the jurisdiction of the ICC. See *id.*, §§ 546, 546a.

> establishing the need of [Amtrak] for the property at issue and requiring the conveyance thereof from the railroad to [Amtrak] on reasonable terms and conditions, including just compensation. Unless the Commission finds that
>
> > (A) conveyance of the property to [Amtrak] would significantly impair the ability of the railroad to carry out its obligations as a common carrier; and
> >
> > (B) the obligations of [Amtrak] to provide modern, efficient, and economical rail passenger service can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to [Amtrak] or available to [Amtrak] by the exercise of its authority under section 545(d) of this title;
>
> the need of [Amtrak] for the property shall be deemed to be established and the Commission shall order the conveyance of the property to [Amtrak] on such reasonable terms and conditions as it may prescribe, including just compensation.

45 U.S.C. § 562(d). Notwithstanding this language, the majority below found it "clear enough" that the statutory phrase "required for intercity rail passenger service," "contemplates" that Amtrak may only condemn property it intends to retain for its own use. Pet. App. 17a. Yet, the plain language of § 402(d) says nothing whatever about whether Amtrak may subsequently reconvey property that it condemns, and in fact creates a presumption that Amtrak "requires" property it seeks to condemn.

It is indisputable here that, as the majority itself acknowledged, what Amtrak "required" was the use of B&M's portion of the Conn River Line "*in a condition permitting resumption of the Montrealer service.*" *Id.* at 18a (emphasis added). Section 402(d), however, does not address the precise question whether Amtrak may acquire the use of suitably-maintained tracks by condemning inadequately-maintained tracks and conveying them

to a more responsible owner. Certainly, by its plain terms, the statute does not require that Amtrak obtain the use of such tracks only by condemning the tracks (or an easement in the tracks) and assuming all rehabilitation and maintenance costs itself. Nor, alternatively, does it mandate that Amtrak seek a grant of trackage rights that would leave rehabilitation and maintenance responsibilities with a railroad that has proven unwilling to discharge such duties in the past.

To the contrary, § 402(d) defines the phrase "required for intercity rail passenger service" in strikingly broad terms. Thus, it provides that Amtrak's "need" for the property "shall be deemed to be established" unless the ICC finds *both* that Amtrak's condemnation "would significantly impair the ability of the railroad to carry out its obligations as a common carrier," *and* that Amtrak's needs cannot be "met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to [Amtrak], or available to [Amtrak] by the exercise of its authority" to condemn non-railroad property pursuant to § 305 of the RPSA. 45 U.S.C. § 562(d)(1)(A) & (B). Because an intention to reconvey the condemned property is not among the factors that may rebut the statutory presumption of "need," § 402(d) would appear affirmatively to permit Amtrak to condemn property that it plans to transfer to another, more responsible carrier. At a minimum, the statutory language does not unambiguously prohibit such condemnations.

Nor does the structure of the RPSA definitively preclude Amtrak from condemning property it intends to reconvey. In ruling otherwise, the majority placed great emphasis on the "interplay" of § 402(d) and § 402(a), which permits Amtrak to compel the use of railroad facilities on ICC-prescribed terms and conditions. Pet. App. 22a. According to the majority, subsection (a) affirmatively limits the circumstances in which, and the purposes for which, Amtrak may employ its condemnation powers. See *id.* (ICC's construction of subsection (d)

improperly allowed acquisition of a "larger property interest than subsection (a) permits"); *id.* at 23a ("Congress did not intend to allow Amtrak . . . to circumvent the requirements of section 402(a)"). Subsection (a), however, does not even refer to subsection (d), let alone circumscribe or pre-condition the exercise of Amtrak's condemnation powers under the latter provision. Congress could have imposed less restrictive means or exhaustion requirements had it intended to do so and can hardly be deemed to have "unambiguously" done so here simply by providing Amtrak with remedial choices.[12] Subsections (a) and (d), moreover, set forth Amtrak's rights in purely permissive terms.[13] The "interplay" of two *permissive* remedial provisions cannot reasonably be viewed as unambiguously imposing a *mandatory* pre-condition for the exercise of one of those remedies.

Indeed, the structure of the statute militates strongly against any such pre-condition. First, in § 402(d) Congress expressly spelled out the alternatives Amtrak and the ICC must consider in deciding whether Amtrak

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[12] The fact that two broadly remedial provisions may overlap "is neither unusual nor unfortunate," and does not give rise to an inference of mutual exclusivity. *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 383 (1983) (citations and internal quotation marks omitted). Moreover, in effectively imposing an exhaustion requirement, the majority overlooked this Court's admonition that decisions concerning the desirability of such requirements "turn on a host of policy considerations which do not invariably point in one direction," and hence "are best left to Congress' superior institutional competence" (*Felder* v. *Casey*, 487 U.S. 131, 148 (1988) (citations and internal quotation marks omitted)), or, alternatively, to the informed discretion of the agency charged with administering the statute. See, *e.g.*, *Coit Indep. Joint Venture* v. *FSLIC*, 489 U.S. 561, 579-81 (1989) (Bank Board has discretion to impose reasonable exhaustion requirement).

[13] Amtrak "*may* contract with railroads . . . for the use of tracks and other facilities and the provision of services," 45 U.S.C. § 562(a) (emphasis added), and "*may* apply to the [ICC] for an order establishing the need of [Amtrak] for the property" it seeks to condemn. *Id.* at § 562(d) (emphasis added). The only mandatory language in either provision is directed to the ICC.

"needs" the railroad property to be condemned. Although it included among these alternatives non-railroad property available to Amtrak pursuant to its powers under § 305 of the Act, Congress failed to include the lesser interests available to Amtrak under § 402(a). See 45 U.S.C. § 562(d)(1)(B). Second, the RPSA expressly directs Amtrak to "[e]xercise . . . [its] best business judgment in taking actions to minimize Federal subsidies." 45 U.S.C. § 501a(1). The "interplay" of this directive with the permissive language of §§ 402(a) and 402(d) strongly suggests that Amtrak has the discretion to choose which of its available remedial powers to employ when seeking the use of properly-maintained railroad property.

The legislative history the majority cited below further buttresses the conclusion that Congress intended to give Amtrak the discretion to choose between its statutory remedies. In explaining the purpose of subsection (d), the Senate Report noted that

> [a]t the present time [Amtrak] leases terminal and other facilities from various railroads. These facilities are not always best adapted to Amtrak's needs, *nor is a lease always the most economical means by which Amtrak could fulfill its requirements for a facility*. . . . Giving [Amtrak] the power of eminent domain, coupled with the ability to seek conveyance of the property through the Commission under this section, will insure that Amtrak can acquire the property necessary to perform its public service mission *at a reasonable price*.

S. Rep. No. 226, 93d Cong., 1st Sess. 4 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2324, 2327 (emphases added). Far from suggesting that Amtrak must seek prescriptive trackage rights (which are the functional equivalent of lease-hold interests) before resorting to its power of eminent domain, Congress affirmatively indicated that Amtrak could forsake lesser interests and employ its power of eminent domain if it found it more cost-effective to do so.

Finally, the Second Circuit's decision in *National R.R. Passenger Corp.* v. *Two Parcels of Land*, 822 F.2d 1261 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987), confirms that the phrase "required for intercity rail passenger service," does not unambiguously preclude Amtrak from condemning property interests it does not intend to retain. In *Two Parcels*, Amtrak condemned non-railroad property pursuant to § 305(d) of the RPSA [14] and reconveyed it to the City of New London, which in turn used the land for a public service road. Amtrak retained only an easement that permitted it to use the road to inspect and maintain certain of its facilities.

Like B&M here, the condemnee in *Two Parcels* argued that, while Amtrak can condemn property for its own use, it cannot condemn property for a third party, *i.e.*, the City of New London. *Id.* at 1265. The Second Circuit found no such limitation in § 305(d)'s requirement—identical to that found in § 402(d)—that the property to be condemned be "required [for] intercity rail passenger service." [15] To the contrary, the Second Circuit deemed this requirement satisfied inasmuch as the property interest Amtrak intended to retain for itself (the easement over the public road) would be used in connection with Amtrak's passenger services. *Id.*[16]

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[14] Section 305(d) provides, in relevant part, that Amtrak may "acquire any right-of-way, land, or other property [except that of a railroad, State, or governmental agency], which is required [for] intercity rail passenger service[,] by the exercise of the right of eminent domain." 45 U.S.C. § 545(d)(1)(B).

[15] As this Court has repeatedly made clear, "identical words used in different parts of the same act are intended to have the same meaning." *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (citations omitted); see also *Morrison-Knudsen Constr. Co.* v. *Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 633 (1983) (same).

[16] On rehearing, the majority below sought to distinguish the decision in *Two Parcels* on the grounds that 1) Amtrak's need for the service road in the latter case was unquestioned, and 2) the Second Circuit was construing § 305 of the RPSA, which makes no

In sum, the language, structure and history of § 402(d) and the RPSA do not speak to the precise question whether Amtrak may condemn property that it intends to reconvey, and certainly do not unambiguously preclude the ICC's affirmative response to that question. To the contrary, the available statutory evidence indicates that Congress intended to give Amtrak the discretion to determine how best its passenger service needs should be met. Indeed, of the six appellate judges that have considered the question, four (including Judge Ginsburg below) have concluded that the phrase "required for intercity rail passenger service" does not limit Amtrak to condemning only those interests in property that it retains for its own use. While Vermont and Massachusetts believe that the construction rendered by the Second Circuit (and Judge Ginsburg) is plainly the correct one, this division within the judiciary establishes, at a minimum, that the relevant statutory language is not so unambiguous as to admit of only one possible meaning. In circumstances such as these, *Chevron* requires the courts to defer to the agency's clearly "permissible construction of the statute." 467 U.S. at 843.

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provision for acquisition of the lesser interests available to Amtrak under § 402(a). Pet. App. 2a. The first distinction, however, simply begs the essential question of what Amtrak "required." As Amtrak and its supporters demonstrated, and the ICC found, in the present case Amtrak required that ownership of the Conn River Line be transferred to a responsible owner. See *infra* at 24-28. The majority's second distinction fails to recognize that § 402(d) creates a *presumption* of need, while § 305 does not. Accordingly, demonstrating need under the former provision should be easier, not harder, than under the latter. In any event, these distinctions do not undermine the essential fact that, by its plain terms, the phrase "required for intercity rail passenger service" does not unambiguously bar condemnation of property interests that Amtrak intends to reconvey.

B. The Interstate Commerce Commission Permissibly Construed § 402(d) To Permit Amtrak To Condemn B&M's Property For Subsequent Reconveyance To Another Carrier.

This Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer," particularly where resolution of a statutory question requires "reconciling conflicting policies, and [where] a full understanding of the force of the statutory policy in the given situation . . . depend[s] upon more than ordinary knowledge respecting the matters subjected to agency regulations." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (footnote, citation, and internal quotation marks omitted). Here, in the face of ambiguous statutory language, the ICC was called upon to determine whether Amtrak 1) could take railroad property from a carrier whose willful neglect and intransigence had forced the cessation of international rail passenger service and 2) reconvey that property to a carrier that had contractually committed itself to upgrade and maintain the tracks to service standards that would permit resumption of passenger services. In the circumstances of this case, the ICC's determination that such a transaction was "required for intercity rail passenger service" was entirely permissible.

1. The ICC's Determination That § 402 Gives Amtrak The Discretion To Determine Which Of Its Remedial Powers Best Meets Its Passenger Service Needs Was Permissible.

The ICC reasoned that, "under sections 402(a)-(d) of RPSA, Amtrak is empowered to seek different types of relief depending on the type of service problems it encounters with other railroads. In each case, relief may be granted only upon application by Amtrak, and in each case different criteria, procedures, and standards apply." Pet. App. 39a; see also *id.* at 115a-116a (same). The ICC's determination that § 402 vests discretion in Amtrak

to choose which of its remedial powers to employ depending upon the service problems it faces is plainly a permissible construction of the statute.

First, as previously noted, the statute sets forth Amtrak's remedial options in permissive language that is entirely consistent with the ICC's finding of discretion. Second, as the ICC observed, the availability of each of the remedies that § 402 prescribes necessarily implies choice: each remedy is independently available to Amtrak provided Amtrak can satisfy the independent prerequisites for each. The obvious import of this statutory structure is that Congress did not intend to limit Amtrak's choice of remedies once the circumstances prescribed by each subsection are shown to exist.

Third, and finally, the RPSA and its legislative history are replete with evidence that Congress intended to afford Amtrak discretion wherever possible. Thus, as previously noted, Congress added § 402(d) to the Act to enable Amtrak to acquire the property interests it needs in the most economical manner possible. See *supra* at 19. Moreover, Congress expressly directed Amtrak to "[e]xercise . . . [its] best business judgment in taking actions to minimize Federal subsidies" (45 U.S.C. § 501a(1)), to "maximiz[e] . . . the use of its resources, including the most cost-effective use of . . . facilities[] and real estate" (*id.*, § 501a(14)), and to "employ[] innovative operating . . . concepts so as to fully develop the potential of modern rail service in meeting the Nation's intercity . . . passenger transportation requirements." *Id.*, § 541. To these ends, among others, Congress exempted Amtrak from ICC regulation of its rates and fares, routes and services, and the abandonment or extension of operations over railroad lines "by trackage rights or otherwise." *Id.* § 546(a).[17]

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[17] Ignoring all of this evidence that Congress intended to vest Amtrak with broad discretion, the majority instead relied on an ICC-formulated policy against "cross-subsidization," which, in the majority's view, militated against the ICC's construction of § 402(d). Pet. App. 22a. The force of this policy, however, is diminished in the

Although these congressional directives, along with the language and structure of § 402 itself, may not have compelled the conclusion that Amtrak has the discretion to choose the remedial power best suited to a particular service problem, these indicia of congressional intent undoubtedly afforded the ICC a permissible basis for reaching such a conclusion. Under *Chevron*, that is sufficient to compel judicial deference to the agency's construction.[18]

2. The ICC's Determination That The Condemnation And Reconveyance Of B&M's Property Was "Required For Intercity Rail Passenger Service" Was Permissible.

In view of its entirely reasonable determination that Amtrak has the discretion to choose which of its remedial powers to exercise, the remaining question before the ICC

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context of the RPSA, which "[e]ncourage[s] . . . the private sector to share the costs of operating rail passenger service, including the costs of . . . facilities." 45 U.S.C. § 501a(2). Whatever its applicability, moreover, there is no evidence of an impermissible cross-subsidy here. While the majority speculated that Amtrak was trying "to cajole a railroad into providing more than its share of the maintenance" (Pet. App. 23a), CV simply agreed to assume essentially the same maintenance obligations that B&M, in 1977, had voluntarily assumed in exchange for payments it deemed adequate.

[18] In addition to its erroneous view of the interplay of subsections (a) and (d) (see *supra* at 17-18), and its mistaken belief that CV is cross-subsidizing Amtrak's operations (see *supra* at 23-24 & n.17), the majority suggested that deference was unwarranted because the ICC's construction raised a "colorable" claim that the condemnation violated the "public use" requirement of the Takings Clause. Pet. App. 21a. This suggestion is frivolous. Despite the majority's insinuations to the contrary, the condemnation here was not a "scheme" undertaken simply to restructure property interests between private parties. Pet. App. 17a. Rather, as the ICC found, the taking of B&M's property was necessary to permit resumption of rail passenger service to three different states and between two countries. Indeed, the public purpose of the transaction is demonstrated by the fact that the three affected states supported it, and state and federal funds were appropriated in order to facilitate it. State and federal legislatures surely would not be devoting public resources simply to help one rail carrier acquire 50 miles of another carrier's tracks.

was whether the condemnation of B&M's line and its subsequent reconveyance to CV was "required for intercity rail passenger service." Because § 402(d) expressly spells out the factors that may rebut the presumption that Amtrak needs property it seeks to condemn, and because Amtrak's intention to reconvey condemned property is not one of the rebuttal factors, the transaction at issue here would appear to be entirely within the contemplation of the statute. In any event, the ICC's determination that Amtrak's passenger service "required" condemnation and reconveyance of B&M's portion of the Conn River Line was clearly permissible in the unique circumstances of this case.

The problems confronting Amtrak with respect to its *Montrealer* service were extraordinary. Despite its contractual maintenance obligations, B&M had allowed its portion of the Conn River Line to deteriorate precipitously over the space of two years. By 1987, over 75 percent of B&M's portion of the line was restricted to speeds below those specified in its operating agreement with Amtrak; Amtrak's average speeds over B&M's segments had dropped to 25.85 and 17.27 miles per hour [19] (J.A. 41); and the *Montrealer*'s running time was over two hours longer than it had been in 1981. *Id.* at 43. Despite a spate of freight derailments and repeated requests by state transportation and Amtrak officials for increased maintenance efforts, B&M refused to undertake even routine maintenance on the line and instead slated it for abandonment.

Faced with the need for properly-maintained tracks and a railroad management that proved consistently unwilling to meet its maintenance obligations, Amtrak concluded that intercity rail passenger service through Vermont and New Hampshire "required" a transfer of own-

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[19] Not only were such speeds commercially unacceptable, they impaired Amtrak's ability to satisfy Congress' requirement that Amtrak maintain a "system-wide average speed of at least 60 miles per hour." 45 U.S.C. 501a(8).

ership of the Conn River Line from B&M to a carrier that promised to upgrade and maintain the lines and that had an exemplary history of meeting such obligations in the past. Before the ICC, B&M argued that Amtrak could meet its needs by obtaining trackage rights under § 402(a) or by acquiring an easement over B&M's property. Amtrak, however, which has invoked its rights under § 402(a) on numerous prior occasions,[20] deliberately eschewed these alternatives based on its conclusion "that only when the [Conn River] line belongs to a party other than B&M will the line be available for prompt upgrading, permitting restoration of reliable and economical passenger service." Pet. App. 116a. Based on the overwhelming evidence of B&M's neglect, the ICC found "that Amtrak has demonstrated sufficient reason to justify acquisition of ownership of the line," and that the

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[20] *See, e.g.*, Finance Docket No. 31062, *Amtrak & Soo Line R.R.—Use of Tracks & Facilities & Establishing Just Compensation* (decided April 11, 1988); Finance Docket No. 30426, *National Rail Passenger Corp. Application Under Section 402(a) of the Rail Passenger Serv. Act* (decided July 5, 1985), *aff'd sub nom. Metropolitan Transp. Auth.* v. *ICC*, 792 F.2d 287 (2d Cir. 1986); Finance Docket No. 30557, *Amtrak & Louisiana & Ark. Ry.—Use of Tracks & Facilities & Establishing Just Compensation* (decided September 25, 1984); *Minnesota Transfer Ry. Ordered to Provide Servs., Tracks & Facilities for the Operation of Trains of the Nat'l R.R. Passenger Corp. & the Establishment of Just & Reasonable Compensation for Such Servs., Tracks & Facilities*, 354 I.C.C. 552, *modified*, 354 I.C.C. 769 (1978); *National R.R. Passenger Corp. & Union Pac. R.R., Use of Tracks & Facilities & Establishment of Just Compensation*, 348 I.C.C. 926 (1977); *National R.R. Passenger Corp. & Terminal R.R. Ass'n of St. Louis, Use of Tracks & Facilities & Establishment of Just Compensation*, 348 I.C.C. 901 (1977), *aff'd sub nom. National R.R. Passenger Corp.* v. *ICC*, 610 F.2d 865 (D.C. Cir. 1979); *Amtrak & the Texas & Pac. Ry., Use of Tracks & Facilites & Establishment of Just Compensation*, 348 I.C.C. 645 (1976), *aff'd in part sub nom. National R.R. Passenger Corp.* v. *ICC*, 610 F.2d 865 (D.C. Cir. 1979); *Amtrak & Washington Terminal Co., Use of Tracks & Facilities & Establishing Just Compensation*, 348 I.C.C. 86 (1975), *modified*, 348 I.C.C. 859 (1977), *aff'd sub nom. National R.R. Passenger Corp.* v. *ICC*, 610 F.2d 881 (D.C. Cir. 1979).

proposed reconveyance to CV did not constitute an "abuse of § 402(d) processes." *Id.* at 43a.

In the circumstances of this case, it was clearly reasonable and permissible for the ICC to determine that a transfer of the Conn River Line from a neglectful owner to a trustworthy one was "required for intercity rail passenger service." In concluding otherwise, the panel majority relied in large measure on its perception that Amtrak could have "commandeered" the use of properly maintained tracks through prescriptive trackage rights available under § 402(a), or by condemning an easement over B&M's lines pursuant to § 402(d). The ICC, however, which possesses far greater expertise respecting such matters (*Chevron*, 467 U.S. at 844), reasonably rejected these alternatives as inadequate.

A grant of statutory trackage rights under § 402(a) would have left Amtrak in precisely the same untenable position it found itself in prior to seeking redress from the ICC. Such trackage rights would have entitled Amtrak to operate over B&M's tracks and required B&M to meet certain ICC-prescribed maintenance obligations. Yet Amtrak already enjoyed these very rights under its 1977 operating agreement with B&M. B&M's willingness to breach its maintenance obligations under that contract, and to terminate the contract when Amtrak sued for specific performance, readily demonstrated the futility of employing this less drastic statutory remedy.[21]

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[21] Indeed, Amtrak would have been worse off had it proceeded under § 402(a), inasmuch as that provision requires the ICC to fix compensation for the use of tracks based on the incremental costs associated with Amtrak's operations. While the majority suggested that Amtrak sought to "circumvent" 402(a)'s "requirement" that Amtrak pay such costs (Pet. App. 22a), just the opposite was true: had Amtrak invoked § 402(a), it would have effectively rewarded B&M for breaching a contract in which B&M voluntarily agreed to maintain its tracks to passenger service standards in exchange for specified payments that it had previously deemed adequate. See *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, NAP Cases Nos. 72, 74 (1988) (Nat'l Arb. Panel).

Similarly, condemnation of an easement in B&M's property would have saddled Amtrak with the most onerous burdens of ownership without the full benefits. Such a "remedy" would have left Amtrak not only with the burden of upgrading a line that B&M had allowed, through its own neglect, to deteriorate to dangerously unsafe conditions, but also with the burden of maintaining that line not only for its own use but for that of B&M as well. As Amtrak made abundantly clear before the ICC, it could not responsibly spend $5 million in federal funds and assume sole responsibility for maintaining an isolated island of track simply to operate two trains daily. J.A. 128-29; 132. Rather, Amtrak could responsibly spend such funds only in exchange for long-term maintenance commitments from a freight carrier—commitments B&M had proven unwilling or incapable of meeting in the past.

In short, in the circumstances presented here, the ICC reasonably and permissibly concluded that condemnation and reconveyance of B&M's tracks were "required" within the meaning of § 402(d). That judgment, based on the ICC's expertise in railroad matters generally and Amtrak's service needs in particular, was entitled to deference in the court below and should be accorded proper deference here.

C. Any Doubts Concerning The Propriety Of The ICC's Construction Of § 402(d) Were Laid To Rest By The Independent Safety Board Act Amendments Of 1990.

The majority's failure to defer to the ICC's reasonable and permissible interpretation of an ambiguous statutory provision warrants reversal of the judgment below. Even if the ICC's construction of § 402(d) were not entitled to deference, however, the judgment below must be reversed in light of the Independent Safety Board Act Amendments of 1990. These amendments, passed in direct response to the majority's flawed decision, conclusively establish the propriety of the agency's construction.

Enacted while the majority's initial decision was still subject to rehearing, ISBA expressly provides that Amtrack "may subsequently convey title or other interest in [condemned] property to a third party, if such reconveyance is found by the Commission to further the purposes of [the RPSA]." Pub. L. No. 101-641, § 9, 104 Stat. 4654, 4658. Congress expressly made the amendment applicable to this case,[22] and the amendment's sponsor, Senator Jeffords of Vermont, explained that the law was prompted by, and designed to correct, the majority's initial decision:

> A recent court decision has jeopardized the continued operation of Amtrak's only passenger train to Vermont by restricting its eminent domain authority. *The new provision makes clear that the court misconstrued that authority when it questioned Amtrak's subsequent conveyance of the rail line it acquired. . . .*
>
> This amendment clarifies that, with this and any future case, Amtrak can convey interests in condemned property to a third party when such conveyance furthers Amtrak's statutory purpose under [RSPA], *as it did in the Montrealer situation.* This leaves the structuring of the nationwide rail passenger system to Amtrak's considered discretion, as [RPSA] intends.

136 Cong. Rec. S17668 (daily ed. October 27, 1990) (statement of Sen. Jeffords) (emphases added).

Incredibly, having previously rejected the ICC's construction of the statute because of the supposed lack of "clearer" evidence that Congress intended to permit Amtrak to condemn interests it subsequently reconveys, the

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[22] The amendment provided that it "shall apply to any proceeding instituted before, on, or after the date of enacement of this Act (including any such proceeding pending before any Federal court on such date of enactment)." ISBA, Pub. L. No. 101-641, § 9(b), 104 Stat. 4654, 4658 (1990). The only pending case involving § 402(d) at the time Congress enacted ISBA—and indeed, the only case ever decided under the provision—was this case.

majority deemed this amendment *irrelevant to this case.* The majority attempted to justify its decision by asserting that the amendment only permits Amtrak to convey property "subsequent to a condemnation that is otherwise valid" (Pet. App. 3a) (emphasis deleted); because Amtrak did not need B&M's fee simple interest in the first place, the majority held, the amendment could not have authorized Amtrak to reconvey that interest to CV. *Id.*

This facile reasoning cannot disguise the fact that, as the majority has defined it, Amtrak's "need" is limited to that property which it intends to *retain for its own use.* Accordingly, because a property interest that Amtrak intends to convey to a third party can never, under the majority's view, be "required for intercity rail passenger service," the amendment can *never* be employed. Any attempt to invoke the provision would reveal the invalidity of the initial condemnation.

The majority did not even attempt to explain what purpose the amendment could possibly serve under its reading, for the simple reason that none can be imagined. Congress had already vested Amtrak with the normal powers of a District of Columbia corporation (45 U.S.C. § 545(a)), and, prior to the amendment, Amtrak could have transferred rail property that it lawfully possessed if it complied with the regulatory provisions of the Interstate Commerce Act (49 U.S.C. § 11343). Under the majority's reading, therefore, the ISBA is mere surplusage.

Plainly, the majority did not engage in statutory construction but rather statutory nullification. Barring constitutional infirmity, judges are not free to decline to enforce laws that Congress sees fit to enact. That, however, is precisely what the majority has done here. This Court must reverse the judgment below to give effect to an explicit and unequivocal legislative command that the majority impermissibly disregarded.

II. THE ADDITIONAL HOLDINGS OF THE COURT BELOW ARE INSUFFICIENT TO SUPPORT ITS JUDGMENT.

In addition to relying on its erroneous interpretation of § 402(d), the majority set aside the ICC's order and voided Amtrak's condemnation and conveyance to CV on several secondary grounds, none of which is adequate to support its judgment. Specifically, the majority faulted the ICC for failing to make satisfactory findings concerning B&M's claim of impairment and the availability of alternatives to Amtrak. Apparently born of the same underlying hostility toward the Amtrak-CV transaction that led the majority to disregard an unambiguous directive from Congress, these erroneous alternative rationales should not be permitted to stand in the way of Amtrak's valid exercise of its § 402(d) powers.[23]

A. The ICC Properly Considered And Rejected B&M's Claims That Its Ability To Carry Out Its Common Carrier Obligations Would Be Significantly Impaired.

The majority explained that it could not uphold the ICC's order because the agency had provided only a cursory statement in support of its finding that Amtrak's condemnation would not significantly impair B&M's common carrier obligations, and because, in making that determination, the ICC had focused on "post-hoc remedies aimed at ameliorating" the effects of the condemnation, rather than on the conveyance itself. Pet. App. 19a. The majority erred on both counts.

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[23] Based on its erroneous interpretation of § 402(d), the majority remanded the case to the ICC for proceedings that could only have resulted in dismissal of Amtrak's application. At a minimum, therefore, the decision below must be reversed so that, in any subsequent proceedings, the ICC may evaluate Amtrak's application free of the majority's impermissibly restrictive interpretation. As the States demonstrate below, however, no remand to the agency is necessary here, inasmuch as the majority's other reasons for invalidating the ICC's order are without merit.

Even if the ICC's findings concerning B&M's impairment claims were not entitled to deference—and plainly they are—the agency's determination that B&M would not suffer impairment of its common carrier obligations was so obviously correct as to be virtually unassailable. B&M itself had allowed its portion of the Conn River Line (upon which its direct competitor, CV, depended) to fall into a state of chronic and dangerous disrepair, and had done so in order to favor the competing line owned by its parent, Guilford.[24] In fact, before Amtrak invoked its eminent domain authority, B&M had slated the line for abandonment. This conduct completely belied B&M's later claim that loss of its fee ownership interest in the line would significantly impair its operations. Moreover, a transaction that left B&M with the right to provide service on the line even after Amtrak and CV had undertaken the rehabilitation and enhanced maintenance efforts that B&M itself refused to undertake plainly *benefitted*, rather than impaired, B&M's operations. Cf. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 583 (1986) (claims of competitive injury cannot be predicated on conduct that benefits competitors).

In any event, the ICC's findings were more than sufficient. B&M raised its claim of impairment in connection with its opposition to *both* Amtrak's condemnation of B&M's lines and CV's companion request that the ICC approve its acquisition of the line.[25] In concluding that the ICC had failed adequately to respond to B&M's competitive concerns, however, the majority simply ignored

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[24] See *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, NAP Cases Nos. 72, 74 (1988) (Nat'l Arb. Panel).

[25] CV filed for approval, under expedited regulatory review provisions (see 49 U.S.C. § 10505), of its acquisition of B&M's portion of the Conn River Line and its proposed grant of trackage rights back to B&M over that line. In opposing CV's application, B&M argued that it would "result[] in the gradual loss of B&M's traffic base, reduction of its service, and eventual exit from the market." Pet. App. 83a.

agency findings on CV's companion application that were fully applicable to B&M's § 402(d) impairment claims. Thus, in its decision, the ICC incorporated by reference an earlier, extensive competitive analysis it had conducted of the market in which CV and B&M compete and the rail routes, including the Conn River Line, over which they operate. Pet. App. 83a (citing *Guilford Transp. Indus., Inc.—Control—D&H Ry.*, 366 I.C.C. 396 (1982), *aff'd in part and remanded in part sub nom., Central Vermont Ry.* v. *ICC*, 711 F.2d 331 (D.C. Cir. 1983)). Among the findings that the Commission adopted as fully applicable to the Amtrak-CV transaction was its prior determination that "the extent to which a rail carrier can exercise control over traffic is greatly diminished in the face of intense motor carrier competition" in the area, and that this competition precluded carriers such as CV from garnering traffic from rail competitors by means other than reduced price and greater efficiency. Pet. App. 83a. Moreover, the ICC found that B&M could continue to serve its existing customers as a result of CV's grant-back of trackage rights, and that B&M would enjoy access to any new shippers on the line by virtue of CV's commitment to provide reciprocal switching. *Id.* at 83a-84a, 90a-91a.

Perhaps recognizing the inherent implausibility of B&M's claim, the majority sought to buttress its conclusion by suggesting that § 402(d) effectively *precludes* the ICC from considering the ameliorating effects of any post-conveyance measures, such as the trackage rights grant to B&M here. *Id.* at 19a. This suggestion, however, is equally insupportable.

The plain language of the statute itself imposes no affirmative limitations on the factors the ICC may consider when determining whether a condemnation will cause significant impairment, nor does its structure and legislative history reveal any congressional intent to so limit the ICC's review. In fact, the statute expressly authorizes the ICC to prescribe the terms and conditions

upon which Amtrak can condemn property. In the absence of compelling evidence to the contrary, a statutory provision that simultaneously grants authority 1) to approve condemnations and 2) to impose conditions on such approval can hardly be presumed to hermetically seal these two administrative functions off from each other.

Indeed, the irrationality of such an approach is demonstrated by this very case. Here, the conveyance to Amtrak was expressly conditioned on the grant of trackage rights to B&M. *Id.* at 91a-92a, 107a. Thus, even if, as the majority insisted, the ICC's finding with respect to impairment must "focus on the 'conveyance of the property to [Amtrak]' and not on post-hoc remedies" (*id.* at 19a), the grant of trackage rights to B&M was not a "post-hoc remed[y]," but an inseparable part of the conveyance itself: without such a grant, no property would have been conveyed.

Even if the majority's construction of subsection (d)(1)(A) were a reasonable one—and the States submit that it plainly is not—the court was not at liberty to substitute its reading of the statute for that rendered by the agency entrusted with its administration. Because the statutory language at issue does not unambiguously preclude the ICC from considering the ameliorating effects of terms and conditions it imposes on Amtrak's condemnation of railroad property, the court was required to defer to the agency's determination that such consideration is permissible. The majority's failure to do so provides no basis for affirming its judgment.

B. The ICC's Finding That Amtrak's Passenger Services Required Transfer Of The Conn River Line From B&M To CV Was The Product Of Reasoned Decisionmaking And Was Supported By Substantial Evidence.

The majority also apparently invalidated the ICC's decision on the ground that the agency failed satisfactorily to explain why Amtrak's needs could not be met through

acquisition of lesser interests in B&M's tracks.[26] Specifically, the majority faulted the ICC for (1) failing to recognize that an easement constituted a lesser interest available under § 402(d); (2) failing to articulate its "responsible owner" response to B&M's "lesser interest" argument in its decision; and (3) failing to explain with sufficient clarity the basis for its assertion that Amtrak had justified acquisition of the line. Pet. App. 20a. It was the majority's misapprehension of the facts of this case, however, rather than any agency departure from principles of administrative decisionmaking, that accounts for the "failures" the majority identified.

In the initial decision instituting proceedings under § 402(d), the ICC observed that "Amtrak has set forth a detailed history of its dealings and negotiations with B&M over the Conn River Line, and of its efforts to maintain passenger service over this line." Pet. App. 130a. Among other facts, the Commission noted that Amtrak had attempted to persuade B&M to upgrade the line, had offered to purchase it, and had instituted arbitration proceedings, all in a vain effort to reinstate *Montrealer* service. *Id.* at 130a & n.11. In its interim decision, the ICC rejected B&M's motion to convert Amtrak's application into one for trackage rights under § 402(a), explaining, in unmistakable terms, that "Amtrak's position clearly is that *only when the subject line belongs to a party other than B&M* will the line be available for prompt upgrading, permitting restoration of reliable and economical passenger service." Pet. App. 116a (emphasis added). As the States

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[26] Because the majority linked its pronouncements concerning the agency's supposed failure to engage in reasoned decisionmaking with its ruling that § 402(d) prohibited the Amtrak-CV transaction, the decisional import of those pronouncements is unclear. See Pet. App. 21a ("In light of the statutory language limiting Amtrak's condemnation privileges to interests in property that are required for intercity rail passenger service, we find that the Commission's conclusory assertions fail the requirement of reasoned decisionmaking"). The States assume here that the majority meant to establish a separate ground for its decision.

have previously shown, moreover, Amtrak, along with affected states and shippers, offered voluminous evidence in support of this position. See *supra* at 5-9, 24-28.

Hence, by the time of its final decision, the agency had clearly framed the basis for Amtrak's request for relief under § 402(d) and had recited the essential facts underlying that request. It was against this backdrop that the Commission rejected B&M's "lesser interest" argument, stating that "[w]e find that Amtrak has demonstrated sufficient reason to justify acquisition of ownership of the line." Pet. App. 43a. Placed in its proper context, the meaning of this statement, and the facts upon which it was based, were abundantly clear. The ICC was not confused about the availability of easements under § 402(d), nor did it read the words "or interests in property" out of that provision. Rather, it simply concluded that, on the record before it, Amtrak had shown that its passenger services required transfer of the Conn River Line from a patently neglectful B&M to the more responsible CV, and that, accordingly, lesser remedies were inadequate.

Plainly, when read in conjunction with its earlier decisions, the basis for the ICC's final decision was "understandable" (*SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947)), and "the agency's path [could] reasonably be discerned." *Motor Vehicles Mfrs. Ass'n.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). No one familiar with the agency's proceedings could have harbored the slightest doubt that the Commission had found that *Montrealer* service required transfer of the Conn River Line to more responsible railroad management, and the court was not "compelled to guess at the theory underlying the agency's action." *SEC* v. *Chenery Corp.*, 332 U.S. at 196-97.[27] The

[27] The majority's suggestion that the ICC's "responsible owner" argument "emerge[d] for the first time on appeal" (Pet. App. 20a), is simply and demonstrably wrong. Far from a post-hoc rationalization, the ICC's acceptance of Amtrak's claims was one of the central underpinnings of its decision.

requirement of reasoned decisionmaking demands nothing more. Certainly, the ICC's decision is not invalid simply because the agency failed to cite to the specific portions of the record supporting its finding that Amtrak had justified acquisition of the line, or because the agency failed explicitly to incorporate by reference its earlier decisions. Nor can there be any dispute that the ICC's critical finding was supported by substantial evidence. These requirements having been met, the agency's decision should have been affirmed.

CONCLUSION

For the foregoing reasons, respondents State of Vermont and Commonwealth of Massachusetts request that this Court reverse the judgment below and remand the case for resolution of the issues that the court of appeals did not reach in its decision.

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November 21, 1991

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